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Changing Government: the 1971-72 Newfoundland Example

Peter Neary

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Newfoundland has long provided a rich field of interest for students of constitutional minutiae. The reason for this is not hard to find. In 1842 the Colony's elective Legislative Assembly and its appointive Legislative Council, both established in 1832, were combined in one chamber.¹ In 1861, only six years after "responsible government" had been achieved in the Colony, the government of John Kent was dismissed from office by Governor Sir Alexander Bannerman.² In 1908 a general election produced a tie and a crisis which was resolved only through the action of Governor Sir William MacGregor.³ In 1919 a motion of no confidence put forward by the Minister of Finance was seconded by the Prime Minister and carried unanimously by the House.⁴ In 1924, a defeated Prime Minister, while charged with larceny, entered the Legislature and participated in a division in which the government prosecuting him was defeated by one vote.⁵ In 1934 Newfoundland gave up "responsible government" and for the next fifteen years was governed by a commission appointed by the government of the United Kingdom.⁶ Finally, in 1949, after her people had voted in two referenda on their constitutional future, Newfoundland became a province of Canada.⁷ To the inviting fare which these tasty morsels offer to the appetite of the gourmet of constitutional practice in the British mode, must now surely be added the *chef d'oeuvre* of the Newfoundland politician, the strange and bewildering events of 1971-72.

*Peter Neary, Department of History, University of Western Ontario.

1. For the details see Gertrude E. Gunn, *The Political History of Newfoundland, 1832-1864* (Toronto: Univ. of Toronto Press, 1966) at 85-109

2. S. J. R. Noel, *Politics in Newfoundland* (Toronto: Univ. of Toronto Press, 1971) at 23

3. *Id.* at 68-76. See also Noel's *Politics and the Crown: The Case of the 1908 Tie Election in Newfoundland* (1967), 33 *Canadian Journal of Economics and Political Science* 285-91

4. *Supra*, note 2 at 128

5. *Id.* at 171-72

6. See my *The Political Economy of Newfoundland, 1928-72* (Toronto, 1973) 21-22

7. *Id.* at 103-106

On October 6, 1971, the thirty-fourth General Assembly of Newfoundland was dissolved and a general election called for October 28.⁸ The previous election had been held on September 8, 1966, over five years before, and had resulted in a sweeping victory for the Liberal Administration of Joseph R. Smallwood, who had been Premier of the Province since April 1, 1949.⁹ In 1966 Smallwood and his Liberal Party won 39 seats and 61.8% of the popular vote; the Progressive Conservative Party won the remaining 3 seats and 34% of the popular vote. A master political tactician, Smallwood had always shown consummate skill in the timing of elections. His initial victory at the polls, on May 27, 1949, had come in the first flush of enthusiasm over the recently completed union with Canada. His subsequent highly successful appeals to the voters — in 1951, 1956, 1959, 1962 and 1966 — had given him an extraordinary place in Canadian provincial politics. That he should, therefore, have found himself in the fall of 1971 with all capacity for electoral surprise lost and with the opposition threatening to appeal to the Crown for dissolution if the government would not, represented a startling turn of fortune.

The root of Smallwood's trouble lay in the manifold discontents which a generation of rapid social and economic change had bred in the Newfoundland people. In the late 1960s these discontents suddenly erupted into a powerful urge for political change — an urge which, in time, the Progressive Conservative opposition was able to channel. Some governments are like some people: they have a vigorous youth, a prosperous maturity, and then a decline and fall. Arguably, Smallwood's administration fits this pattern. It is impossible, of course, to say exactly when his government entered the final stage, though in retrospect it can be seen that its demise was signalled by a series of electoral reverses. The first of these came on October 20, 1967, when a provincial by-election in Gander district, located in a region which had voted Liberal consistently since 1949, produced a Progressive Conservative victory. The previous month J. W. Pickersgill, Smallwood's man in Ottawa since 1953, had resigned both his portfolio as Minister of Transport and his seat in the House of Commons as member of parliament for

8. *Evening Telegram* (hereafter *E.T.*), St. John's, October, 7, 1971

9. For a survey of the political history of Newfoundland, 1945-72, see my *Party Politics in Newfoundland, 1949-71* (1971), 6 *Journal of Canadian Studies* 3-14 and *Politics in Newfoundland: the end of the Smallwood era* (1972), 7 *Journal of Canadian Studies* 3-21

Bonavista-Twillingate. Smallwood had been born in this constituency, which, in an earlier generation, had nurtured the populism of William Coaker. Pickersgill had made its name synonymous nationally with Liberal hegemony. Few doubted that the Liberals would hold the seat in the federal by-election to be held on November 6; but whereas Pickersgill had obtained a majority of 6,426 in a two way fight in 1965, his successor as Newfoundland's minister in the federal cabinet, Charles Granger, managed a majority of only 1,386 over his Progressive Conservative and Independent opponents. In the federal election which followed in June, 1968, Bonavista-Twillingate, along with five Newfoundland constituencies, resisted the national trend and elected Progressive Conservative members. Since federal and provincial politics were in this period inextricably linked in Newfoundland, Smallwood had met his first general election defeat, albeit at one remove. The long slide downward had begun.

Yet Smallwood was still a formidable opponent. The exercise of power was by now second nature to him and his provincial opponents needed time to prepare themselves to seize the opportunity which had so suddenly come their way. Immediately after the election he reorganized his cabinet and in the autumn of 1969, was able to fight back a formidable challenge to his leadership of the Liberal Party by John Crosbie, himself a former minister. But the price of this victory against a member of one of Newfoundland's most powerful families was very great. Smallwood's vulnerability was now plain for all to see and his fate became a provincial obsession. He fought back with all the skill that a lifetime in politics had given him, above all else bargaining for time in which to regain public favour. His efforts, which included the swearing in of five new ministers during the summer of 1971, were characteristically unorthodox and energetic. Yet by the time his hand was forced in October, the Progressive Conservative opposition, now led by Frank Moores, one of the new M.P.s elected in 1968, and fortified by John Crosbie, who had joined the Tories in June, were making the government's every act controversial. The contest which followed was bitterly fought and held the attention of Newfoundlanders as had no other election since the referendum of July, 1948, which had decided their constitutional future. On October 28, 86.28% of the registered voters went to the polls; this figure was higher than in any preceding election and reflected the sometimes frenetic political activity in the

Province since 1968. As the votes were cast, anything seemed possible; but the reality of election night and the days following belied even the most bizarre forecasts.

Smallwood listened to the election returns while driving around St. John's.¹⁰ What he heard must have been tantalizing. His Party was losing many of the seats it had held in the previous Assembly and was running behind the P.C.s in popular vote. On the other hand, it was not yet clear who would command a majority in the new Assembly. When the counting stopped in the early hours of October 29 each Party had carried eighteen seats and five others were undecided. The remaining place in the forty-two seat House had been taken by Tom Burgess, the leader of the New Labrador Party (N.L.P.), who had been elected in the prosperous but isolated mining constituency of Labrador West.¹¹ The final verdict was rendered some seventeen hours after the polls had closed: P.C.s 21, Liberals 20, N.L.P. 1.¹² One constituency, St. Barbe South, which was to figure prominently in later events, had passed from Liberal to Tory hands on the counting of the last poll.¹³ Moreover, each Party had scored three victories by fewer than 106 votes.¹⁴ By contrast the Conservatives had captured 51.33% of the popular vote to 44.47% for the Liberals.¹⁵

Clearly, the government had suffered a massive reverse; but if Smallwood was down, he was not yet out, for the result left undecided which Party would command a majority in the new Assembly. The Conservatives could lay claim to half the members but if they were to elect a speaker from their own number, twenty government supporters would face twenty-one opposition suppor-

10. *E.T.*, October 29, 1971

11. *E.T.*, October 29, 1971

12. *E.T.*, October 30, 1971

13. *Id.*

14. In Bay de Verde and Burgeo & La Poile Liberal candidates had defeated their Progressive Conservative opponents by 21 and 88 votes respectively. In Labrador South Josiah Harvey of the Liberals had defeated Michael Martin of the N.L.P. by 83 votes. Close Conservative wins over Liberals were Carbonear (68 votes), Ferryland (106 votes) and St. Barbe South (8 votes). In accordance with section 78, subsection 3 of the Election Act of 1954 the Chief Electoral Officer, H. W. Strong, published a statistical report on the election in *The Newfoundland Gazette* on February 1, 1972. Except where otherwise noted, all statistical references to the election here are from this source. The St. Barbe result is marked "Undetermined (Decision of Supreme Court of Newfoundland)" in Mr. Strong's report. The reason for this is evident below.

15. The remainder of the popular vote was divided as follows: N.L.P., 2.4%; New Democratic Party, 1.73%; Independent, 0.07%.

ters — twenty Liberals and one N.L.P. On the other hand the existing Liberal government would, assuming a Liberal speaker, face a House of nineteen government supporters and twenty-two opposition supporters — twenty-one P.C.s and one N.L.P. Tom Burgess's position was obviously pivotal: he could not keep Smallwood in power (with his support and a Liberal speaker twenty government supporters would face twenty-one opposition supporters) but he could presumably bring Moores to power by declaring for a Conservative government. With the support of Burgess the Conservatives could elect a speaker and still outvote the Liberals, twenty-one to twenty.

Burgess, however, was a tricky quantity. Elected as a Liberal (also for Labrador West) in the provincial election of 1966, he had joined John Crosbie and Clyde Wells, another dissident Liberal member, in August, 1968, in launching a movement to democratize the Party.¹⁶ Later he had announced that he would henceforth sit in the House as a member of a new Party he intended to organize, the New Labrador Party.¹⁷ But this step did not apparently preclude involvement in Liberal affairs; thus at the time of the 1969 Liberal leadership convention he had supported T. A. Hickman, the Minister of Justice, for the leadership of the Party.¹⁸ The basis of support for the Party led by the Irish born Burgess himself lay in the frontier discontents of continental Labrador vis-à-vis the Island of Newfoundland. The N.L.P.'s avowed purpose was to achieve social and economic justice for a productive but sadly neglected region. His occupational background was that of an official in the United Steelworkers of America and his reputation was that of a cheeky Irishman, the workingman's Tom.

Given all this, it would be difficult for him to abandon his third party status completely. On the other hand, his present cock of the walk position held out the possibility of great advancement for himself and a hearing for his immense but thinly populated region which the electoral arithmetic of the Province might never give it again. In short, his situation was not without hope for either Moores or Smallwood. To Moores Burgess offered the chance to form a government. To Smallwood he offered the possibility of a stalemate and time to cast about, with all the resources of government at his

16. See my *Politics in Newfoundland: the end of the Smallwood era*, *supra*, note 9 at 13

17. *Id.* at 15

18. *Id.*

command, for fresh support in a political arena where patronage has often proved stronger than principle.

In the weeks following the election Smallwood fought desperately to maintain his position. Politically, the wisdom of his course is arguable; but constitutionally his performance was that of a virtuoso. Smallwood had often been accused of testing the limits of "responsible government"; now, in his adversity, he ventured onto procedural ground that few had previously trod. His first step was to proclaim his right to continue to govern. With Moores and his supporters clamouring for the government's resignation, Smallwood took the position that the fate of his Administration would be decided by the new Assembly.¹⁹ Since the government had been granted supply by the previous Assembly to carry it through until March, 1972,²⁰ the new House need not meet pending the outcome of recounts and any litigation that might arise out of the election. This opening gambit was endorsed by Senator Eugene Forsey, one of Canada's leading constitutional authorities, when he told the St. John's *Evening Telegram*, the newspaper with the largest circulation in the Province, that the only constraint on Smallwood was that he call the House together soon. "I don't know whether it should be days or weeks," he said, "but clearly it wouldn't be proper for a minority Party to continue governing without meeting the House [within] a reasonable period of time."²¹ What "reasonable" meant was anybody's guess. Needless to say, Smallwood sought to give it the broadest possible interpretation. In effect, he took the position that the government need not call the House together until it was absolutely certain who had the right to sit in it.

Daily now the war of nerves between Smallwood and Moores intensified. Indeed, the slanging match on television, radio and in the newspapers, the *Evening Telegram* in particular, about the legitimacy of the government made the election itself seem but a momentary pause in the scabrous donnybrook that had been in progress in the Province since 1969. "The premier's attitude," the *Evening Telegram* trumpeted on October 20, ". . . can only serve to darken his image in defeat still farther. He has already shown himself a poor loser by . . . trying to turn a heavy rebuff into some kind of triumph."²² Smallwood was no ordinary political leader and

19. *E.T.*, October 30, 1971

20. *id.*

21. *Id.*

22. *Id.*

when his opponents smelled blood they were relentless in their pursuit. Moreover, something more than a mere change of government was on the minds of some of them at least; when justice triumphed, as it surely would, the rascals who had ransacked the Province for twenty years would be made to answer for their sins. At one heady moment a columnist in the *Evening Telegram* actually wondered "what would happen if Frank Moores went and sat in Joe Smallwood's chair in Confederation Building and started to run the government of the Province" — in effect, staged a *coup d'etat*.²³ The politicians themselves, however, had better sense. For success they looked to the traditional instruments of their trade: propaganda, patronage, custom and the law. The arrival in St. John's from Labrador City on October 29 of Tom Burgess offered them ample scope for their talents.

With considerable flourish, Burgess travelled from Labrador in the company of John Christopher Doyle, Smallwood's favourite mining promoter and a central figure in the development of western Labrador.²⁴ Leaving Doyle in Stephenville, he flew to St. John's in a jet owned by Lundrigans, a major local contracting firm, and checked into the capital's Holiday Inn.²⁵ There, having proclaimed his independence and his determination to get "the best possible deal for Labrador,"²⁶ he apparently began receiving all comers. "Basically," he told one reporter, "my inclinations are Liberal but that can not be taken as an indication as to what way I'm going."²⁷ Having met with his elected members on November 1, Moores had this to say about the member for Labrador West: "We will not make any special concessions to Mr. Burgess in order to obtain his support to form a government, but will approach the problems of Labrador in a manner that is one of fair and equal treatment for all

23. *E.T.*, December 31, 1971. "It is easy to understand," the same columnist wrote, "Mr. Smallwood's motive for hanging on. He is drunk with power and has lost all contact with reality. That is why he still thinks he is Premier. Now it looks as if some of his cabinet ministers have delusions as great as their master's. They go on burdening the province with new commitments with a kind of Liberal arrogance which points to them being God's Chosen Ones. It is quite amazing that they have the gall to go to Confederation Building to sit in their offices, let alone issue press releases and hold press conferences. They forget that they now rule not as a legal government but as a Liberal Party which has rejected the normal procedures of democracy. In the same way the Nazi Party ruled Germany."

24. *E.T.*, November 1, 1971

25. *E.T.*, November 2, 1971

26. *E.T.*, November 1, 1971

27. *Id.*

the province If Mr. Burgess wants to go along with us, that's fine. If he doesn't, then that's his decision."²⁸ Faced with this apparent determination, Burgess at once let it be known that the Conservative attitude would not necessarily influence him "to go the other way."²⁹ He would only decide when the "time" was right: "It is not right," he offered, "at this particular moment."

On November 1, Smallwood despatched his Minister of Finance, Fred Rowe, one of the defeated Liberal candidates,³⁰ to Ottawa to represent the Province at a meeting of a provincial ministers.³¹ In undertaking this mission, Rowe announced that his Ottawa engagement would be his last before resigning but his right to represent the Province did not pass without challenge.³² On the general question of what the government now could and could not do Moores stated, again after his initial meeting with his members, that any agreements, deals or borrowings entered into by the Liberal Administration after election day would "be the subject of review" by any future Conservative ministry.³³ "We will honor appointments within the civil service which deal with the operation of the various departments," he said. "However, we will not honor the appointment of any defeated Liberal candidate as a sign of political patronage."³⁴

Smallwood made his next move in Ottawa, whither he had followed his finance minister. In the past he had enjoyed great influence in the capital, thanks to his long hold over most of Newfoundland's seats in the House of Commons. But at times, most notably during the strike in the province in 1959 of two locals of the International Woodworkers of America, he had greatly embarrassed some of the national leaders of his Party.³⁵

28. *E.T.*, November 2, 1971

29. *Id.*

30. Rowe, now a Senator, had been defeated in Grand Falls by Aubrey Senior. Altogether seven ministers had been rejected in the election. On October 31, Smallwood said that the defeated ministers would resign in a "reasonable and decent interval" (*E.T.*, November 1, 1971). Senator Forsey's view of the matter was that defeated ministers could remain in office for "eight or nine months or even a year . . . a year would be considered a reasonable period of time in any kind of respectable jurisdiction" (*Id.*) In saying this he had in mind the examples of General A.G.L. McNaughton in the third ministry of Mackenzie King and C.F.G. Masterman in Asquith's Liberal ministry (letter to author, November 7, 1977)

31. *Id.*

32. *E.T.*, November 3, 1971

33. *E.T.*, November 2, 1971

34. *Id.*

35. See the author's, *Politics in Newfoundland: the end of the Smallwood era*,

Newfoundland's present representative in the federal cabinet, Donald Jamieson, did not owe his position in his native Province to Smallwood.³⁶ His attitude in the existing crisis, therefore, was crucial. Jamieson could hardly be expected to tie the albatross of the Newfoundland Liberal Party around his neck, but if Smallwood and his colleagues were to have any chance of success in their daring enterprise the federal minister's neutrality at least was essential.

On November 2, the Premier and the Minister gave separate interviews in Ottawa about events in the Province. Smallwood now said that he would resign if impending recounts showed the Liberals in a minority. "I have no desire to hang on," the Premier said, "if I do not have a majority."³⁷ Jamieson supported Smallwood's stand and said that the best course now was for all concerned to await the results of the recounts.³⁸ This procedure also had the imprimatur of Senator Forsey who the same day was quoted by the *Evening Telegram* as saying that Smallwood "would look foolish if he resigned now and then the recounts gave him an extra two or three seats."³⁹ Moreover, Smallwood was not required to call the House together before the recount results became known. If, however, he did not have a majority after the recounts, he would have to call the House together as promptly as possible. "It does not mean," the Senator said, that "he would have to interrupt an afternoon nap to do this, but I would think he would be expected to call it, say, within two weeks time, although there could be circumstances like a lot of illness or a major storm in the province which could give reason for a delay beyond that time period." If the recounts produced a deadlocked House, Smallwood would be entitled to another dissolution. His right to this would be manifest in the inability of the House, on meeting, to elect a speaker.

The chance of this happening was considerably diminished on November 10 when Moores, having met in Montreal with Tom Burgess, let it be known that the N.L.P. leader would vote with the Conservatives in the Legislature.⁴⁰ This "political mixed mar-

supra, note 9 at 3-6

36. Jamieson entered the House of Commons as the member for Burin-Burgeo in a by-election on September 19, 1966. He has been successively Minister of Defence Production, Minister of Transport, Minister of Regional Economic Expansion, Minister of Industry, Trade and Commerce, and Secretary of State for External Affairs (*The Canadian Parliamentary Guide*, 1977, 260)

37. *E.T.*, November 2, 1971

38. *Id.*

39. *Id.*

40. *E.T.*, November 10, 1971

riage'' was consummated at the St. John's Holiday Inn on November 12 when Moores and Burgess held a joint press conference. Despite offers from Liberal supporters that would make "James Bond look like a boy scout," Burgess had decided to support Moores because of the "reasonable assurance" the latter had given him a new attitude towards Labrador.⁴¹ Only success in the recounts now stood between Moores and office, for if the election night result was confirmed, the Conservatives would now have twenty-two supporters and the Liberals twenty.

Smallwood meanwhile had taken a short vacation at an undisclosed destination following his Ottawa visit.⁴² On his return to the Province he announced on November 8 the resignations of six of seven cabinet ministers defeated on October 28.⁴³ John Nolan, the Minister of Economic Development, was asked to stay on in the cabinet pending a recount in Ferryland district, where he had lost by only 106 votes. Then, on November 11, Smallwood announced in a television address that he intended to resign both as leader of the Liberal Party and as Premier of the Province no matter what the outcome of the recounts. To this end a leadership convention would soon be held. "I shall resign as leader and I will not accept renomination . . . Should I be Premier then, I'll resign that position a day or so afterwards . . . If the Liberals have a majority after the recounts we'll stay on in power to meet the House in the coming winter . . . If the Liberals are in a minority, then I'll go to the Lieutenant Governor . . . and resign."⁴⁴

The focus of the crisis now shifted to the courts. Under the terms of the Newfoundland Election Act of 1954 and its amendments, the returning officer for each district was required to complete an "official count" of the votes.⁴⁵ Candidates then had up to ten days

41. *E.T.*, November 13, 1971

42. *E.T.*, November 9, 1971

43. See, *supra*, note 30

44. *E.T.*, November 12, 1971

45. Deputy returning officers were required by the Act to return their ballot boxes to their district returning officer. The box for each poll had to be sealed with the ballots and other materials used in the election together with a statement of the poll inside in envelopes provided for the purpose (S. Nfld. 1954, No. 79, ss. 74, 9 & 10, 351). Having received the ballot boxes from his deputies, the returning officer was required to open them, take from each the official statement of the poll, and "add together the number of votes given for each candidate" (Section 75, 2). This process is referred to in the Act "as the official addition of the votes." When it was completed, the returning officer was required to seal each box again "with a special metal seal supplied to him for that purpose" (S. Nfld. 1964, No. 29, Section 75,

to apply for recounts.⁴⁶ When completed, these "official counts" confirmed the standings of election night: 21 P.C.s elected, 20 Liberals, 1 N.L.P.⁴⁷ Subsequently, petitions for recounts were made as follows:

TABLE I*

<i>Date of Petition</i>	<i>Petitioner</i>	<i>District</i>	<i>Result on Official Count</i>	
November 12	Brendan Howard (P.C.)	Bay de Verde	William Saunders (L)	1306
			Brendan Howard (P.C.)	1285
			Liberal majority	21
November 12	Trevor Bennett (L)	St. Barbe South	Edward Maynard (P.C.)	1756
			Trevor Bennett (L)	1748
			P.C. majority	8
November 15	John Nolan (L)	Ferryland	Thomas Doyle (P.C.)	1976
			John Nolan (L)	1871
			P.C. majority	105
November 15	Walter Hodder (L)	Burgeon-La Poile	Allan Evans (P.C.)	2754
			Walter Hodder (L)	2671
			Andrew Wells (N.D.P.)	174
			P.C. plurality	83
November 16	Michael Maher (L)	St. Mary's	Gerald Ottenheimer (P.C.)	1217
			Michael Maher (L)	1134
			P.C. majority	83
November 16	George Clarke (L)	Carbonear	Augustus Rowe (P.C.)	1828
			George Clarke (L)	1755
			P.C. majority	73

*Table compiled from the official count as published in the *Evening Telegram* on November 13, 1971, and from the records of the Supreme Court of Newfoundland.

The first of the recounts was held on November 18 by Chief Justice Robert S. Furlong of the Newfoundland Supreme Court.⁴⁸ It confirmed the election of William Saunders in Bay de Verde and a certificate of election was issued to him the following day. The next recount — that of the votes cast in St. Barbe South — commenced at 10 a.m. on November 22 before Mr. Justice H. G. Puddester. The result was sensational: the count could not be completed because the ballots cast in polling station 13 at Sally Cove, where Mrs. Olive Payne had been deputy returning officer, were missing. These, it now became known, had been burned on election night.⁴⁹

4A, 142). Thus, the official count did not involve any examination of individual ballots.

46. See S. Nfld. 1954, No. 79, ss.50, 359

47. *E.T.*, November 13, 1971

48. Records of Supreme Court of Newfoundland

49. A magisterial enquiry conducted by Magistrate C.C. Stone of Woody Point, Bonne Bay, found that the ballots had been "inadvertently burnt on election night." Magistrate Stone found no evidence of "any malicious or wilful intent."

Faced with this impasse, Judge Puddester, on November 24, issued to Melvin Gilley, the returning officer in St. Barbe, the certificate required of the court under Section 91 of the Election Act. "I was unable," the Judge certified, "to complete the recount because the votes cast at the said election in polling station 13 in the said District, having been previously destroyed by the deputy returning officer for the said polling station, were not available to be recounted."⁵⁰

Maynard now pressed Gilley to confirm his election, telegraphing him as follows:

I now call upon you to transmit immediately to the Chief Electoral Officer the Writ of Election with your endorsement thereon that I have been elected a Member of the House of Assembly comma a copy of the declaration of my election which you signed and delivered to me at the conclusion of the official count and the other documents which you are now required to send to him by section 78 (1) of the Election Act.⁵¹

But Gilley had already submitted the writ of election on November 24, endorsing it to show that the election in the seat was "undecided."⁵²

When subsequent recounts confirmed all other election night winners, the issue in St. Barbe South became decisive. With no usable certificate of election having been issued there, the standings in the new Assembly now were: P.C.s 20, Liberals 20, N.L.P. 1, undecided 1. Since Tom Burgess had now agreed to support Moores, the Conservatives could, presumably, control the House with the deciding vote of a Conservative speaker (twenty-one to twenty). On the other hand, the debacle in St. Barbe South meant that Smallwood did not yet have to call the House together, since it was still not clear who had the right to sit in it. Moreover, if the Liberals could get the courts to declare the seat vacant and then carry the subsequent by-election, they would have the same number of members as the Conservatives had with the addition of Tom

"To hold one person up." he concluded, "as the object of criticism and suspicion in this case seems to be most unfair and undeserving." Mrs. Payne apparently did not realize the ballots had been burnt "until the night of the recount." No charges were laid as a result of this enquiry (Magistrate Stone's report is available in the office of the Chief Electoral Office, St. John's).

50. For a copy of the certificate see Supreme Court of Newfoundland, 1971, No. 1601

51. *Id.* answer filed by William M. Marshall, December 17, 1971. Marshall had been elected for the Conservatives in St. John's East.

52. *Id.*

Burgess (twenty-one each). If the Liberals were then to elect a speaker, they stood to be defeated on the very first vote. But any Conservative government would be faced with exactly the same problem. In the circumstances, Smallwood would have a powerful argument for another dissolution. At the very least St. Barbe South gave him more time to manoeuvre and there was no telling what the prospect of a Liberal by-election victory might touch off by way of movement of elected members from one Party to another. The path across the floor was well trodden in Newfoundland and to make the journey figuratively, before the House had even met, not beyond the bounds of possibility. For the Conservatives success in St. Barbe South — whether through the courts or on the hustings — meant power at last; but the prospect of fighting a by-election in a seat they had carried by only eight votes must have been very distasteful to them. It would be like fighting the general election all over again — only this time in a single seat, where the government had a great deal of support and where it could bring the full weight of its influence to bear. With Smallwood threatening to rise phoenix like from his own ashes the Conservatives looked to the Crown and the courts for redress.

On November 25 Mr. Moores released to the press the text of Ed Maynard's telegram to Melvin Gilley.⁵³ The election in St. Barbe South, he argued, was not null and void until such time as it had been proved through the controverted Election Act that this was the case, "and this has not been done."⁵⁴ Moores said his Party would welcome "a thorough investigation into the burning of the ballots," noting that Mr. Smallwood had been "far too confident awaiting the results of the recounts and one cannot help but ask why?" "We are witnessing," he ventured, "a spectacle of a man glorying in the past when the future of our Province is what is important. The hard fact remains that 52 per cent of the people in this Province voted P.C. in this past election and 44 per cent voted Liberal. The hard fact remains that Tom Burgess has openly declared he will be supporting a P.C. government which gives us a clear majority of seats."

On November 30 Moores addressed a letter to the Lieutenant Governor, Mr. E. John A. Harnum, in the same spirit.⁵⁵ Reviewing

53. *E.T.*, November 26, 1971

54. *Id.*

55. I am grateful to the Hon. Frank D. Moores, former Premier of Newfoundland, for the use of this letter and his other correspondence following. The Lieutenant

the election results and the magnitude of the turnout at the polls, he attributed the contrast between the popular vote received by each party and the distribution of members elected to "the present disgraceful distribution of voters in electoral districts in this Province." With regard to the St. Barbe South situation, Moores claimed again "that the official count now stands, so that Mr. Maynard of the Progressive Conservative Party is the elected Member for that District." This situation might change if the Supreme Court granted "a controverted election petition" but it might be "many weeks" before "a final determination" was made on such a petition. With the support he now had from Burgess, Moores argued, the Liberals could not govern even if they ultimately carried St. Barbe South in a by-election:

Under no circumstances will the Progressive Conservative Party or Mr. Burgess vote for any nominee for the Speakership by the Liberal Administration that now holds office and that now has been repudiated by the people of Newfoundland. As soon as the House of Assembly is called together the Government will fall whether or not a Liberal member is returned for the District of St. Barbe South . . . the present Liberal Administration does not have a majority of the members of the House of Assembly and clearly cannot obtain a majority of members in the House of Assembly even if that Party were successful in a possible by-election for the District of St. Barbe South.

Moores next asserted that "every modern precedent" indicated that the Liberal Administration should resign. He cited three examples: the Nova Scotia election of 1970 following which the P.C. Smith government had resigned in the face of a result which had given it twenty-one members to twenty-three for the Liberals and two for the N.D.P.; the Manitoba election of 1969 following which the P.C. government of that Province had resigned in favour of an N.D.P. government which would be in a minority position in the House; and the Canadian general election of 1957 following which a Liberal Administration had resigned in favour of a P.C. minority one. "In all these instances," Moores concluded, "the governments involved accepted the fact that they had lost the support and confidence of the people although no other party received an absolute majority."

From description and precedent, Moores now moved on to advice. Specifically, he submitted "that the present leader of the

Governor had previously been sent messages by P.C. supporters in St. Barbe South (*E.T.*, November 26, 1971).

Liberal Administration should be called upon to tender his resignation to Your Honour in accordance with the invariable practice in situations where the government party has failed to secure a majority of seats in the Legislature as the result of a general election.” If the Premier refused to resign, then the Lieutenant Governor should, in accordance with his discretionary powers, inform him “that the House of Assembly must be called together within the next week or 10 days so that any claim of the present Administration that it controls a majority of the members of the House of Assembly can be put to the test.” Unless the government could meet the House, appoint a Speaker, and carry on business “in the traditional manner,” there was no justification for its continuance in office. Moores also informed Mr. Harnum that his Party took

the position that no actions of the present government, except the transaction of very ordinary routine business, should now be countenanced. No vacant offices in the Civil Service should now be filled, no contracts should now be entered into and no obligations should now be undertaken by the rejected Liberal Administration of this Province the borrowing of money, the issuance of guarantees, the making of appointments and the dealing with the many crises that now affect this Province cannot be undertaken by an Administration that will be defeated as soon as the House of Assembly is called together even were that Administration successful in electing a Member in the District of St. Barbe South if another election were ordered in that District.

Finally, Moores assured the Lieutenant Governor that “if called upon by you to form a government I will meet the House of Assembly at an early date in the month of December to appoint a Speaker and that my Administration will be in a position to carry on the business of this Province and to have the House of Assembly pass Supply when needed.” For good measure Tom Burgess wrote the Lieutenant Governor the following day to second what Moores had said in his letter. Between them, Moores and Burgess, with the able hand of John Crosbie in the background, had put the opposition case forcefully; but the Conservative leader’s arguments were at best controversial. His claim that Maynard was entitled to sit for St. Barbe South until the Courts had declared on the disposition of the seat was clearly arguable. Again, other precedents could be found to counter the ones he had mustered: instances in which governments had stayed in power though facing opposition legislative majorities. Mackenzie King’s daring display in 1925-26 was but one example.

Moreover, while Moores's analysis of what would happen to the Smallwood government in an evenly divided House was no doubt correct, there was no evidence that he could command the House himself in the same circumstances.

If the situation of an evenly divided House should arise, the question facing the Crown would be the one that had confronted Governor Sir William MacGregor after the Newfoundland tie election of 1908: who should have the right to dissolution. But for the moment this was mere speculation. The Crown, of course, must be guided always in Constitutional matters by the facts before it and these were clear enough. Only if the Lieutenant Governor accepted Moores's argument about Maynard's right to sit on the House pending any litigation that might arise out of his election could the Conservative leader form the government that he promised. In the case of St. Barbe South legal remedy had not yet been exhausted and until it was there was no reason for the Crown to act. As for ordering the government to call the House together, Smallwood could still claim that the Assembly ought not to meet until it had been established fully who had the right to sit in it. Accordingly, Harnum's reply on December 2 to Moores's six page typewritten missive could hardly have been more blunt or less promising — or for that matter more constitutionally correct: "Thank you for your letter of November 30th regarding the matter of the recent election. I have now to tell you that I have referred your letter to my Ministers for their advice."

The previous day, December 1, Ed Maynard had sought to have his election validated by applying to the Supreme Court that a writ of mandamus be issued to Melvin Gilley directing him so to endorse the writ of election for the district of St. Barbe South.⁵⁶ Then, on December 2, counsel for Trevor Bennett filed a petition before Mr. Justice Puddester calling upon the court to declare the election in St. Barbe South void.⁵⁷ While the hearings on these petitions were pending, Moores renewed his efforts to obtain the assistance of the Crown. Thus, in a radio and television address on the night of December 2, he once more called upon the Lieutenant Governor to intervene, insisting that the Crown had the power either to request the government's resignation or to inform it "that the House of Assembly must be called together now to resolve this situation."⁵⁸

56. Supreme Court of Newfoundland, 1971, No. 1597.

57. Supreme Court of Newfoundland, 1971, No. 1601

58. *E.T.*, December 3, 1971

On December 14, after Mr. Justice Puddester had refused, on December 8, Ed Maynard's application for a writ of mandamus,⁵⁹ Moores appealed to the Governor General. His letter, he told Mr. Michener, was written on the unanimous request of the twenty-one (he counted Maynard as elected) Progressive Conservative members of the House of Assembly and Mr. Burgess. The facts of the case were set out in his and Mr. Burgess's letters to the Lieutenant Governor and in the latter's letter of reply to him, all of them enclosed. "It appears quite obvious," he continued, "the Smallwood Liberal Administration has no intention of resigning office. I am most apprehensive His Honour the Lieutenant Governor will not exercise his constitutional responsibilities and dismiss the Smallwood Liberal Administration or alternatively call the House of Assembly into immediate session. I have been asked, therefore, to humbly petition Your Excellency to tender your good advice to His Honour the Lieutenant Governor of Newfoundland and Labrador in the hope that he will bring about the resignation or dismissal of the Smallwood Liberal Administration or alternatively call the House of

59. Supreme Court of Newfoundland, 1971, No. 1597. Mr. Justice Puddester's decision was founded on sections 120, 121 and 135 of the Election Act. Under section 120 a petition "complaining of . . . no return . . . may be presented to the Supreme Court by a candidate." Section 121 made this provision: "whenever a petition is presented under this Act complaining of no return, such order may be made thereon by the Court as is deemed expedient for compelling a return to be made, or the Court may allow the petition to be tried in the manner herein provided with respect to ordinary election petitions." Section 135 (i) provided that "Every election petition shall be tried by two Judges without a jury." Citing these provisions, Justice Puddester reached this conclusion: "Even assuming that the Supreme Court of Newfoundland would have, on general principles, jurisdiction to issue a writ of mandamus directing any official to carry out a duty imposed upon him by the Election Act in connection with an election held under that Act . . . I am now, after a great deal of study and thought as well before as after the hearing . . . convinced that mandamus does not lie here because . . . the legislature of Newfoundland has in its wisdom set up a special court — an election court as I shall call it — consisting of two Judges of the Supreme Court of Newfoundland and has given the election court jurisdiction to deal with, among others, the very question raised here — that of no return — and has also given to the election court power to make the very order I am being asked to make in this mandamus application, that is, an order compelling a return to be made — in effect to grant mandamus.

In my view, therefore, if Mr. Maynard has a specific legal right to be declared to be the elected representative for the District in the House of Assembly then sections 120 and 121 of the Election Act provide a specific legal remedy for enforcing that right which is no less convenient, beneficial and effectual than a writ of mandamus as such directed to Mr. Gilley would be. Accordingly, I dismiss this application of Edward Maynard for a writ of mandamus . . . Melvin Gilley, and Trevor Bennett who was given leave to appear and to be heard at the hearing, are both entitled to their costs against Edward Maynard."

Assembly of Newfoundland into immediate session. The gravity of the constitutional and political situation in Newfoundland is such that I respectfully request Your Excellency's urgent attention to this problem."

Receipt of this letter was acknowledged on December 17 and the Governor General himself replied on December 24. Once more Moores had the door slammed in his face:

In response to your letter of December 14th, 1971, and enclosures (received December 17th), I have given consideration to the request which you made. There seems to be no doubt that as Governor General I have no constitutional right or duty to offer to His Honour the Lieutenant Governor of Newfoundland and Labrador the advice that you requested me to give him with respect to terminating the present Administration of the Province or calling the Legislative Assembly into session.⁶⁰

Everything now hinged on St. Barbe South and Trevor Bennett's petition, the hearing on which had been set for January 5. Few cases in recent Newfoundland history have aroused as much interest and the legal talent on both sides was impressive. Bennett was represented at the hearing by Nathaniel Noel, a former Liberal M.H.A., and Maynard by James Greene, a former leader of the provincial Conservative Party. Their arguments were heard by Chief Justice Furlong and Mr. Justice Arthur Mifflin. Their decision against Bennett and awarding costs to Maynard was filed on January 11. The essence of Chief Justice Furlong's argument was as follows:

The law provides the grounds on which an election can be, or more correctly, is to be declared void. These grounds are discoverable either in the [Election] Act or at common law. In a general way they relate and are referable solely, to matters which occur either before the casting of votes or during the actual balloting. The underlying reason for declaring an election void is that it has been established that some conduct on the part of those entrusted with the conduct of the election, has prevented the ballot being conducted properly. I think it is a new concept to hold that what happens after an election has been completed and after a poll has been declared to say that the declared wishes of a majority, no matter how small, of the voters must be set aside and the opponents to begin all over again. To take this position is as unfair as it is illogical. To go further, if the motive for seeking to

60. Michener could, of course, have intervened on the advice of his ministers. For examples of advice by the Government of Canada to Lieutenant Governors see Eugene Forsey, "Dominion Status for the Provinces" in *Freedom and Order* (Toronto: McClelland & Stewart, 1974) at 157-77

avoid an election for these post-election irregularities is to prevent abuse, then to throw the whole election in a district open again is to breed corruption and dishonesty. I think that once the result of a vote has been ascertained, and that it has been established that the votes cast by the electors have properly been cast without any taint or corruption or intimidation, then the election must be accepted as the final declaration of the voters . . . I think the law to be clear: if the election was carried out properly and in substantial manner in the spirit of the Act, and if the voters were able to express their choice clearly and decisively without any obstruction or hindrance an election should not be set aside because of some failure to observe the letter of the Act. This admits of only one qualification, and that is, that if the failure to observe the letter of the Act in the opinion of the election court could have altered the result of the election then it may be set aside. I would add to this that by the result, I mean the ultimate election of one or other of the candidates, and not the number of votes which are received more than another . . . where the voters had a free and unfettered opportunity to express their choice then the Court should not interfere without being satisfied that there was in fact no true election . . . I have little difficulty in arriving at the conclusion that this election was properly conducted and there are no grounds upon which it should be set aside and declared void. The electors freely made their choice known, they voted and their votes were counted in all the polling stations in the District, including Polling Station No. 13 at Sally Cove. The only failure in the mechanics of this election was that a recount of the votes was not possible — some of the ballots were destroyed after they had been properly counted. It cannot be over emphasised that the [Election] Act provides for the official counting to be done at the individual polling stations by the Deputy Returning Officers in the presence of the candidates, or their agents, and the result to be recorded and certified by the Deputy Returning Officer in a Statement of the Poll in Form 48. The Act provides for a judicial recount, but where one is not sought then the result certified in Form 48 is the sole measure of the candidate's performance. So with this case; there was no recount; not because one was not sought, but because it was a physical impossibility. Where there is no recount then the Statement of the Poll is the announced result, and this must be so, unless the election be set aside. I have said there are no grounds to set aside the election, and it follows logically that I must say the results at this polling station No. 13 are those shown in Form 48. The Returning Officer for the District has made his official addition and has certified the Declaration of Election (Form 50) with the following result:

Edward Maynard 1756

Trevor Bennett 1748

This result must be endorsed on the Writ of Election and it is ordered that the Returning Officer comply with this direction of the Court. The petition must be dismissed, the election of Edward Maynard is affirmed, and a certificate to this effect has been issued for the information of the House of Assembly.⁶¹

Mr. Justice Mifflin also noted that Bennett's petition did not allege "any wrongdoing before or during the counting of the votes cast for the candidates or before the official addition of the votes by the returning officer from the statements of the poll prepared by the deputy returning officers and the issue of a declaration in Form 50 by the returning officer that Edward Maynard had received the larger number of votes and was therefore declared elected . . . the mistake was made after the votes were cast, after the poll was closed, and after the votes were properly counted and the official addition of the votes was properly made."⁶² This line of argument led him to precisely the same conclusion as Chief Justice Furlong:

Such a case is not one in which the election should be declared void; the election was properly conducted up to and including the counting of the votes for each candidate and the preparing of the statement of the poll so far as polling station thirteen is concerned. And there is no suggestion that it was not so conducted so far as any other polling station in St. Barbe South is concerned A recount "delays" the making of a return; it does not "prevent" the making of a return if one can be made. And one can be made if, as in St. Barbe South, the votes have been cast and counted in accordance with the Act but a recount cannot be completed because of an innocent mistake made, after the votes have been counted, not by a candidate or his agent or anyone acting for him but by an election official appointed to have some part in the conduct of the election. To hold otherwise would do a grave injustice to Mr. Maynard; the mistake was not his; it was made after the votes were counted; there was no irregularity during the holding of the poll. And, not only would it do an injustice to Mr. Maynard but it would do an injustice to the voters of St. Barbe South because they would in effect be disenfranchised in the election through no fault of any elector or of any candidate. Moreover, not to order a return to be made but to declare an election void under the circumstances would leave the door open to the possibilities of practices which would invalid any election.

Bennett could presumably have appealed the decision of the

61. Supreme Court of Newfoundland, 1971, No. 1601, "Judgement of Furlong, C.J."

62. *Id.*, "Judgement of Mifflin, J."

Newfoundland court to the Supreme Court of Canada but he did not do so. On the possibility of appeal Senator Forsey told the *Evening Telegram*: "I won't comment on what I think of such an idea"; "considering the great public protest," it would be "very unwise" for the Premier to stay on pending such an appeal.⁶³ Nor did Smallwood attempt this course: the government, it seemed, now had a certain majority against it in the new Assembly (twenty-two to twenty) and on January 13 Mr. Smallwood announced that his government would resign, an intention he effected on January 18.

He had maintained himself for so long by invoking the letter of the constitution rather than its spirit. Yet if he had skated on the edge of propriety he had done so in masterly fashion and had never gone over. Moreover, whatever may be thought of the wisdom of his course politically, his daring rearguard action, by testing the limits of "responsible government," left behind it some interesting precedents and questions. The first of these involves the calling together of a House after an election. In effect Smallwood successfully defended the proposition that a government faced with an uncertain verdict at the polls need not meet the House until recounts and litigation under the Election Act have made it clear who commands the House, if anyone. In the case of Trevor Bennett's petition the Newfoundland Supreme Court gave precedence to the initial count over a candidate's right to a recount. The Crown seems to have behaved rather differently: in the calling together of the Assembly as a whole it gave precedence to legitimate proceedings by candidates relevant to the control of the House over the interim verdict of election day itself. Left perhaps unanswered was the question of the limitations, if any, on the exercise of power by the Smallwood government after the election. When a government clearly has been defeated in an election, custom decrees that, pending resignation, it will limit itself to what Mr. Moores liked to call "very ordinary routine business." Moores argued throughout that Smallwood's government should limit itself or be limited in the same way but there is no evidence that the Crown expressed an opinion on this matter. Is a government in limbo on the same footing as one about to enter purgatory or worse? It might still well be wondered.

The sequel to Smallwood's resignation was of a piece with what had gone before. On January 13 Tom Burgess had let it be known

63. *E.T.*, January 12, 1972

that his support for the Conservatives was now contingent on the Tory caucus again making public the guarantees which had been given him.⁶⁴ One of these guarantees, he later claimed, was a place for him in the cabinet.⁶⁵ The same day Burgess stated that he and the Tories would have to reach an agreement by the next afternoon "or else."⁶⁶ When asked to amplify this remark, he said: "Or else the country will be into another general election." On the 14th he said that he did not want "to back Mr. Moores into a corner"⁶⁷ but the following day announced that he would be writing to the Lieutenant Governor to revoke the commitment to the Tories he had made in his letter to Mr. Harnum on December 1.⁶⁸ His intention now was "to vote on each piece of legislation and issue as my conscience dictates." He would not, he said, accept another commitment from the Tories "if they painted it on the white cliffs of Dover with a tar brush." Thus when the Moores government was sworn in on the 18th, it faced a highly uncertain future in the House. If the Tories were to elect a speaker from their own number, the twenty Liberal members and Mr. Burgess could combine to defeat the new administration at will. On January 21, however, this threat was removed when W. A. Oldford, who had been elected as a Liberal in Fortune Bay, announced that he would not take his seat in the Assembly.⁶⁹ Oldford had left the magistracy and been sworn into the Smallwood government as a Minister without Portfolio on August 2.⁷⁰ On November 25 he had been sworn in as Minister of Supply and Services. He had carried Fortune Bay by 251 votes, his Tory opponent there being H.R.V. Earle, a former Liberal Minister who had gone into opposition after the tumultuous Liberal leadership campaign of 1969. In announcing his decision, Oldford said that he had entered politics with a great deal of "apprehension and reluctance" and wished to return to the magistracy.⁷¹

64. *E.T.*, January 13, 1972

65. *E.T.*, January 17, 1972

66. *E.T.*, January 13, 1972

67. *E.T.*, January 15, 1972

68. *E.T.*, January 17, 1972

69. *E.T.*, January 22, 1972. Mr. Oldford's letter to the Clerk of the House is dated January 21, 1972 (I am grateful to the Hon. G. R. Ottenheimer, the present Speaker of Newfoundland House, for this information. Oral communication, December 21, 1977). Mr. Oldford was said by the press to have "resigned" his seat. Technically, of course, this was not correct since he had never been sworn in and taken the seat to which he was entitled. The true meaning of his letter to the Clerk of the House, however phrased, was what is said above — that he did not intend to sit.

70. *E.T.*, November 26, 1971

71. *E.T.*, January 22, 1972

Commenting on this development T. A. Hickman, now Tory Minister of Justice, said that an application from Mr. Oldford for a magisterial appointment would be considered but that the latter's rights under the relevant legislation would "have to be the subject of fairly careful scrutiny."⁷² Ultimately, this scrutiny produced a favourable verdict, Mr. Oldford's passage back to more tranquil waters being completed on February 9, when he was reappointed magistrate at Grand Falls.⁷³

Tranquility, however, was not yet to be the lot of Mr. Moores, for three days after Mr. Oldford's unusual exit Hugh Shea, who had been elected as a Conservative in St. John's South, announced that he now intended to sit in the House as an Independent.⁷⁴ Shea, who had been passed over for office, had contested the leadership of the Tory Party at the convention which had chosen Moores. His reasoning now was that the district which had elected him was "so chronically filled with problems" that it had "to be represented in the cabinet."⁷⁵ His action once again put the government in jeopardy; assuming a Conservative speaker, nineteen Tories would face nineteen Liberals, Mr. Burgess and Mr. Shea when the House opened. The threat facing the new government was made even more explicit on January 31 when both Burgess and Shea announced that they would sit in the House as Liberals.⁷⁶ Equally startling, Burgess now also announced that he would be a candidate for the leadership about to be vacated by Mr. Smallwood of the Liberal Party. "Nobody can deny," he said, "that if I were the leader of one of the established parties in essence the rewards that will come to the people of my district as a result of my success will be far greater than me sitting as an Independent."⁷⁷ The New Labrador Party was a "one-shot deal," to make Labrador the "focal point of attention."⁷⁸

The two mavericks were accepted unanimously by the Liberal caucus on February 2, the day before registration began for the

74. *E.T.*, January 25, 1972. For Shea's own account of this period see his *Shea's Newfoundland Seduced* (New York, 1976)

75. *Id.*

76. *E.T.*, February 1, 1972

77. *Id.*

78. *Id.*

72. *Id.*

73. By Minute of Council 137. I am grateful to Mrs. Anne Hart of the Centre for Newfoundland Studies, Henrietta E. Harvey Library, Memorial University for this information (oral communication, December 21, 1977)

Party's leadership convention at the Canon Stirling Auditorium in St. John's,⁷⁹ Four leadership candidates presented themselves to the delegates to this convention: Mr. Burgess; Edward Roberts, who had served in Mr. Smallwood's cabinet; Rod Moores, a twenty-two year old student at Memorial University; and Vincent Spencer, a businessman from Windsor. The first candidate in the field, Steve Neary, who had also served in the Smallwood government, had dropped out on January 31 in favour of Mr. Roberts.⁸⁰ The latter easily carried the convention on the afternoon of February 5, winning 564 votes to 82 for Burgess, 14 for Moores and 3 for Spencer.⁸¹

To say the least, Mr. Roberts assumed the leadership of the Liberal Party in anomalous circumstances. As things stood, he would, when the House opened, command a legislative majority from the opposition benches. On the other hand he was intimately associated with Mr. Smallwood and through him with the electoral reverse of October and the subsequent desperate struggle of the Liberal government to maintain itself in power. Not surprisingly, Mr. Roberts chose to play a waiting game. To defeat the government precipitously might bring a further stinging rebuke from the electorate. Yet if the new government faltered, Mr. Roberts might find himself in the Premier's chair — and without the necessity for a new election. The problem with this strategy was maintaining caucus solidarity: loyalty has never been the most prominent of Newfoundland political virtues and in the spring of 1972, after the Oldford, Burgess and Shea initiatives it seemed to be a particularly scarce commodity.

On February 19 Mr. Roberts explored the constitutional implications of the existing political balance in a letter to Mr. Harnum.⁸² Pointing out that twenty-one of those elected in October had said they intended to support the opposition and twenty the government, he informed the Lieutenant Governor that he intended "to make a public demand that the Administration advise Your Honour to open the House immediately." "Until the Administration," he wrote, "cause the House to be opened, there is no conclusive way to determine whether the present Administration possess the confidence of the House, in other words the support of a

79. *E.T.*, February 3, 1972

80. *E.T.*, February 1, 1972

81. *E.T.*, February 7, 1972

82. I am grateful to Mr. Roberts for the use of this letter.

majority of the Members.” The fact that “the spending authority” approved by the previous Assembly would be exhausted on March 31 was a “further reason” for immediate action. Next Mr. Roberts repeated a commitment he had made publicly on several occasions not to defeat the government “as long as they act in the best interests of Newfoundland.” While this was “a matter for judgement,” he assured Mr. Harnum that “we have no intention of seeking the defeat of the government on any matter of confidence involving any issue or question which is not of the gravest and most serious nature. We will not seek to defeat the Administration capriciously or lightly. We are prepared to enable the Administration to organize the House, and to proceed with the normal business including consideration of a request by your Ministers for Supply.” Considering the “urgent need for a period of political stability in the affairs of the Government of this Province,” the Liberal members would waive “for the present what many would consider to be our rightful position as a group comprising a majority of the Members of the House of Assembly.” “We do not seek power,” he asserted, “we seek to serve the people of this Province.”

Having thus explained the position he would take when the House met, Mr. Roberts passed on to a discussion of the conditions under which the new Assembly might be dissolved. “My colleagues and I would not presume,” he wrote, “to advise Your Honour with respect to the constitutional position. Nonetheless, it may not be amiss to set forth our view of the position in Newfoundland, so that Your Honour will have the benefit of this information should it be of assistance to you.” Altogether Mr. Roberts dealt with three possibilities: the emergence of an issue “upon which the Administration will not be able to command the confidence of the House”; advice by the Administration to the Lieutenant Governor to dissolve the House “even though they may have received the support of the House on any given measure”; and advice for dissolution “tendered by an Administration which has not even sought to test the House.” While “the decision whether or not to grant a request for dissolution” was a matter that fell “within the absolute discretion of the Crown,” there was “a large and coherent body of precedents and practices” in this regard. The “persistent theme” running through “the writings of the authorities” on the subject was that “an Administration which is defeated by the House on a matter of confidence, or which requests a dissolution even though it has not been defeated, is not entitled to a dissolution if

there is a real possibility that an alternative Administration can be formed.”

With this in mind Mr. Roberts committed himself as follows:

The Opposition group in the House of Assembly, twenty-one in number in a House of forty-one, are capable of forming an Administration. We do not seek to do so, and, indeed, as I have said earlier we have taken precisely the opposite position. Nonetheless, if Your Honour invites me to form an Administration I will do so, and will attempt to carry on the business of the Government of this Province. I take this stand because my Colleagues and I believe that the affairs of the people of Newfoundland and Labrador require above all at this time that there be a period of political stability. So strongly do we hold this belief that we are even prepared to foreswear our claim to be the Government. If the present Administration should spurn our offer to cooperate in an effort to serve the people of Newfoundland, then we would form a Government if Your Honour should invite us to do so If a request is made for a dissolution, then it is a matter which falls entirely within the discretion entrusted to Your Honour by the constitution. We will have no quarrel with whatever decision Your Honour does make. There will be no criticism of the Crown by the Liberal Party as long as I am Leader. On the precedents, however, we submit that if Your Honour felt it was in the best interests of Newfoundland to reject the request for a dissolution, then you would be exercising your prerogative in full harmony with proper constitutional practice as it has developed in Canada and elsewhere. In these circumstances, if Your Honour should invite me to form an Administration, I would do so. I do not seek such an opportunity, but if the interests of the people of Newfoundland require this, then I will discharge my duty to the best of my ability.

True to his word, the new Liberal leader called a press conference two days later and said it was “high time for the Crosbie-Moores administration to open the House of Assembly.”⁸³ The next day Premier Moores, who had for so long pressed Mr. Smallwood on the same matter, said that the government intended to call the House together during the first week of March.⁸⁴ Then on February 25 he announced that a by-election would be held in Fortune District on March 20.⁸⁵ On February 28 he told a press conference that should his Party lose this by-election his government would resign in favour of a new Liberal Administration.⁸⁶ *The Evening Telegram's*

83. *E.T.*, February 22, 1972

84. *E.T.*, February 23, 1972

85. *E.T.*, February 26, 1972

86. *E.T.*, February 28, 1972

initial report on this press conference also said that the Premier had “confirmed that the House would not be called until later this month, perhaps as late as March 22, the first Wednesday after the holding of the Fortune by-election.”⁸⁷ But what was stated as fact one day became a “distinct impression”⁸⁸ the next, for on the evening of the 28th the Premier announced that the House would meet on the afternoon of March 1.⁸⁹

In the event James Russell, the Tory member for Lewisporte, was appointed Speaker, leaving nineteen government supporters to look across at twenty rather than the anticipated twenty-one opposition supporters. The missing member to the right of Mr. Speaker was William Saunders, who had been elected in Bay de Verde and confirmed in his place on a recount.⁹⁰ On February 28 he had addressed a letter to the Clerk of the House indicating that he would not be taking his seat.⁹¹ His departure did not affect the government’s minority position but it ensured that, numerically at least, an administration led by Mr. Roberts would, pending the outcome of the by-election in Fortune Bay, be in exactly the same position in the House. In these circumstances Mr. Moores approached Mr. Harnum for a dissolution on the very evening of the day the House had met. The Moores government had not been defeated in the House; indeed there had been no division there in the brief afternoon sitting.⁹² But Mr. Moores had gained the advantage by meeting the House successfully, albeit on a single occasion. His advice was accepted by Mr. Harnum, leaving the members of the

87. *E.T.*, February 28, 1972

88. *E.T.*, February 29, 1972

89. *Id.*

90. See above Table I.

91. I am grateful to Hon. G. R. Ottenheimer for this information (oral communication, December 20, 1977). Again, it was said that Mr. Saunders had “resigned” his seat. Like Mr. Oldford (see, *supra*, note 69), not having accepted his seat he cannot be said to have “resigned” from it. In practice, of course, not taking a seat in these circumstances had the same effect as resignation.

92. The motion that a select committee be appointed to draft an address in reply to the speech from the throne was carried on a voice vote (*Verbatim Report*, House of Assembly, March 1, 1972). During the afternoon Mr. Roberts made the following remark about Mr. Saunders: “May I say though, Sir, a word in behalf of my absent friend and colleague, the hon. the member for Bay de Verde. I am sure he is at home this afternoon watching on the television. He is not well. He has had some illness recently. I know that he is with us in spirit and I understand that in due course he will be with us in person. I am sorry he is not here. Any man who is elected to the House of Assembly should be here and if he could be here he would” *Id.*

thirty-fifth general assembly with \$259,990.13 in sessional pay for their afternoon's work.⁹³ In the election which followed the Conservatives carried thirty-four seats and the Liberals eight.⁹⁴ Constitutionally at least the good ship Terra Nova had returned to even keel.

93. This figure does not include travel and special allowances — the sessional indemnity at the time was \$6,667.67. John Carter, the Conservative member for St. John's North, refused to accept his sessional indemnity. Mr. Oldford and Mr. Saunders were, of course, not eligible for the indemnity not having been sworn in as members of the House. (I am grateful to the Auditor General of Newfoundland for this information).

94. For the results see *The Newfoundland Gazette*, June 6, 1972